No. 19-431

IN THE
Supreme Court of the United States

THE LITTLE SISTERS OF THE POOR
SAINTS PETER AND PAUL HOME,
Petitioner,

v.

THE COMMONWEALTH OF PENNSYLVANIA AND THE
STATE OF NEW JERSEY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* MICHAEL STOKES PAULSEN AND KEVIN C. WALSH IN SUPPORT OF PETITIONERS

JOHN P. O'HERRON
THOMPSONMCMULLAN, P.C.
100 Shockoe Slip
Richmond, Va. 23219
(804) 698-6253
joherron@t-mlaw.com

JOHN D. ADAMS
BRIAN D. SCHMALZBACH
Counsel of Record
MCGUIREWOODS LLP
800 East Canal Street
Richmond, Va. 23219
(804) 775-4746
bschmalzbach@mcguirewoods.com

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INTEREST OF *AMICI CURIAE*[1]

Michael Stokes Paulsen is Distinguished University Chair and Professor at the University of St. Thomas School of Law. He is the author of *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249 (1995). Kevin C. Walsh is Professor of Law at University of Richmond School of Law. Amici both teach and write about the law of religious freedom, and thus have an interest in the sound development of the interpretation and application of the Religious Freedom Restoration Act.

SUMMARY OF ARGUMENT

Congress enacted the Religious Freedom Restoration Act (RFRA) to ensure that legal protection for religious freedom flows through all federal law and its implementation. RFRA applies to every page of the U.S. Code that has been or will be, as well as the Federal Register. From a federal law's enactment through its implementation and enforcement, the Government has an ongoing obligation to follow RFRA unless Congress makes an explicit carve-out.

Agencies are the front-line authorities for complying with RFRA; their continuing obligation to comply carries with it corresponding authority to offer exemptions. *See Burwell v. Hobby Lobby Stores, Inc.*,

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than the *amici* or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of amicus curiae briefs in these matters.

573 U.S. 682, 694-95 (2014) ("If the Government substantially burdens a person's exercise of religion, under the Act *that person is entitled to an exemption from the rule* unless the Government 'demonstrates that the application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.' § 2000bb-1(b).") (emphasis added). RFRA's religion-protective provision for judicial relief in 42 U.S.C. § 2000bb-1(c) supplies a second line of defense, a judicial backstop against agency underenforcement.

If the Government had fully complied with RFRA from the outset of its implementation of the Affordable Care Act's (ACA) preventive services provision, it would not have found itself in federal court defending RFRA claims brought by religious employers like the Little Sisters of the Poor. But the Government did not comply; it did find itself in court; and it lost. Many times, over many years, in many federal courts.

This Court called a ceasefire in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016), imploring the various parties to find a solution. Instead of a negotiated surrender or truce, though, each side rearmed. Then an election intervened. Finally heeding lessons it should have learned earlier in the long-running litigation, the Government acted quickly to comply with RFRA. But the interim and then final Religious Exemption Rule failed to end the dispute.

In this new chapter, state officials have mobilized the federal courts for a very different purpose. Unlike earlier cases in which private religious employers brought RFRA claims challenging the

underenforcement of federal religious-freedom law, this case is an APA claim brought by state public officials alleging *overenforcement* of RFRA. The Attorneys General of Pennsylvania and New Jersey have repaired to the federal courts to take away RFRA's protections from their own citizens. And the Third Circuit has granted their request.

The Third Circuit's decision setting aside the Religious Exemption Rule flips RFRA's judicial-relief provision on its head by misapplying the APA's standard of review: whether the rule was promulgated "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). The Contraceptive Mandate and its alternative compliance mechanisms impose a substantial burden, so RFRA's text, structure, and history resolve any doubts as to the federal government's authority to grant an actual accommodation that lifts the substantial burden. That is precisely what Congress created RFRA to do. When it comes to federal law, a RFRA runs through it.

ARGUMENT

I. RFRA runs through all of Federal law and its implementation.

Enacted in 1993 to "provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014), RFRA is a "powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995). Congress enacted RFRA to apply "to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of the Act." 42 U.S.C. § 2000bb-3(a).

In applying to all federal law *and its implementation*, RFRA "operates as a sweeping 'super-statute,' cutting across all other federal statutes . . . and modifying their reach." Paulsen, 56 Mont. L. Rev., at 253. RFRA's prohibition in 42 U.S.C. § 2000bb-1(a)[2] and its exception in §2000bb-1(b)[3] combine to provide a rule for all of the federal government.

RFRA accomplishes this sweeping applicability by modifying "the enumerated power that supports the

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[2] "(a) In General. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."

[3] "(b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

particular agency's work." *Hobby Lobby*, 573 U.S. at 695 and n.4. In other words, Congress decided to "carve out a religious exemption from otherwise neutral, generally applicable laws based on its power to enact the underlying statute in the first place." *Guam v. Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002) (cited in *Hobby Lobby*); *Hankins v. Lyght*, 441 F.3d 96, 107-08 (2d Cir. 2006) (holding that RFRA reflects a proper exercise of Congress' enumerated powers, rather than a usurpation of judicial power).

RFRA's effect of modifying or amending existing law—that is otherwise silent on the question of religious exercise—is seen in a broad array of cases. *See, e.g.*, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 439 (2006) (holding that RFRA modified the application of the Controlled Substances Act); *Hankins*, 441 F.3d at 99 (holding that RFRA amends the Age Discrimination in Employment Act); *Guerrero*, 290 F.3d at 1222-23 (holding that RFRA applies to the application of the Organic Act of Guam); *Christians v. Crystal Evangelical Free Church*, 141 F.3d 854, 861 (8th Cir. 1998) ("RFRA is an appropriate means by Congress to modify the United States bankruptcy laws"); *EEOC v. Catholic Univ. of America*, 83 F.3d 455, 457 (D.C. Cir. 1996) (holding that RFRA modifies the applicability of Title VII of the Civil Rights Act).

II. RFRA requires the Agencies to lift the substantial burden imposed by the Contraceptive Mandate and alternative compliance mechanisms.

Because RFRA is a super-statute applying to the implementation of all federal law, the relevant

agencies must follow *both* the ACA and RFRA when formulating regulations to implement the ACA's preventive services provision. The Government's obligation to comply with RFRA did not spring into existence after the Contraceptive Mandate was formulated or challenged. It existed throughout the rulemaking process, including when the Contraceptive Mandate was being crafted.

Although the ACA required regulations providing coverage of preventive services for women in certain health benefits plans, nothing in the ACA required the Contraceptive Mandate in the first place. *See Hobby Lobby*, 573 U.S. at 697. But in formulating and implementing the Contraceptive Mandate, as with the implementation of the ACA itself, the Agencies were subject to RFRA's commands. That is, the Agencies had to avoid substantially burdening the exercise of religion unless the regulations were the least restrictive means of accomplishing a compelling governmental interest. 42 U.S.C. § 2000bb-1(b). This joint obligation to implement the ACA in accord with both the ACA and RFRA led the Agencies from the beginning to modify the Contraceptive Mandate through a series of exemptions and accommodations, and ultimately issue the Religious Exemption Rule. *See* 78 Fed. Reg. 39,870, 39,873-39,875 (July 2, 2013); 83 Fed. Reg. 57,536, 57,540 (Nov. 15, 2018).

If it was ever in doubt, the Agencies' authority—indeed, their obligation—to modify prior rulemaking to comply with RFRA was indisputable following this Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.* There, this Court held that the Contraceptive Mandate, standing alone, imposed a substantial burden on the claimants' exercise of religion in

violation of RFRA. 573 U.S. at 719-21. RFRA therefore authorized rulemaking to exempt employers whose religious exercise was substantially burdened by the Contraceptive Mandate. *See id.* at 694-95 ("If the Government substantially burdens a person's exercise of religion, under the Act *that person is entitled to an exemption from the rule* unless the Government 'demonstrates that the application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.' § 2000bb-1(b).") (emphasis added). The Court recognized that religious employers have a right be relieved of this substantial burden despite the ACA's silence on religious accommodations.

The same is true of the alternative compliance mechanisms in the Government's earlier "accommodations" for non-exempt religious employers. These efforts evidenced the prior Administration's awareness of the need to issue rules compliant with RFRA. That responsibility continued when religious objectors refused on religious grounds to complete the alternative compliance mechanisms. Still imposing a substantial burden on the religious exercise of certain non-exempt employers, the Agencies had to keep complying with RFRA's commands. *See* Br. of Pet., Little Sisters of the Poor Saints Peter and Paul Home, at 34-41; 45 C.F.R. 147.132.

That duty required the Agencies to weigh incremental advancement of the government's policy interests against the substantial burden placed on certain employers' religious exercise. Balancing these interests, the Agencies had a slew of options, from

eliminating the Contraceptive Mandate entirely to expanding the already-existing exemptions. *Cf.* 42 U.S.C. § 2000cc-3(e) (listing the various ways the government can avoid substantial burdens on religious practice in the RLUIPA). The Religious Exemption Rule represents the Agencies' appropriate determination that *offering alternative means for religious employers to comply with the Contraceptive Mandate was not enough for the Agencies to comply with RFRA*. That determination triggered all the authority the Government needed to implement RFRA and the ACA together through the Religious Exemption Rule.

The Third Circuit set aside this determination by fundamentally misapprehending RFRA in two critical ways. First, the court treated the law as applying only to courts rather than to the government in the first instance. *Commonwealth of Pennsylvania v. President United States of Am.*, 930 F.3d 543, 572 (3rd Cir. 2019) ("RFRA authorizes a cause of action for government actions that impose a substantial burden on a person's sincerely-held religious beliefs, and provides a judicial remedy via individualized adjudication."). This ignores RFRA's super-statute status and, as addressed below, ignored the posture of the case and the question before the court.

Second, the court decided the agencies lacked authority to issue the Religious Exemption Rule by incorrectly considering the ACA and RFRA independently from each other, rather than as substantively intertwined and simultaneously applicable. *Id.* at 570-72. The relevant question is not whether the ACA or RFRA standing alone authorized the agencies to issue the Religious Exemption Rule.

Instead, the question is whether the ACA as modified by RFRA authorizes the agencies to modify the scope and applicability of the Contraceptive Mandate via the Religious Exemption Rule. It does. RFRA confers authority to adopt cross-cutting and statute- and program-specific regulations. *See* 42 C.F.R. 54.5 (regulations citing RFRA and guaranteeing independence of religious organizations receiving certain funding); 81 Fed. Reg. 91,494, 91,537 (Dec. 16, 2016) (final rule citing RFRA to accommodate Native American eagle taking). In fact, that is precisely what Congress created RFRA to accomplish. When it comes to federal law, a RFRA runs through it.

III. The Third Circuit's ruling oversteps the secondary, religion-protective role of the federal courts in RFRA analysis

The government's obligation to implement the ACA and RFRA together existed apart from whether the agencies would eventually find themselves defending against a RFRA claim in an action for judicial relief under 42 U.S.C. § 2000bb-1(c).[4] RFRA is a law governing the agencies and other government actors in the first instance. It applies secondarily as law for a court to apply in resolving a claim or defense brought under it. Under RFRA, the front-line authorities for determining how the government will respond to a substantial burden imposed by federal law are the government actors responsible for implementing the federal law in question. RFRA's judicial remedy provides a religion-protective

[4] "(c) Judicial Relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."

backstop for claimants who contend the government's response was inadequate.

The Third Circuit flipped RFRA's judicial relief provision on its head by reasoning that "[b]ecause Congress has deemed the courts the adjudicator of private rights of action under RFRA, we owe the Agencies no deference when reviewing determinations based on RFRA." 930 F.3d at 572 (citing *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 434 (2006)). But this proceeding did not involve a "private right[] of action" against the federal government to enforce RFRA. Unlike the standard RFRA case challenging agency underprotection of religious freedom, this proceeding is an APA suit by state public authorities to take away federal religious freedom protections granted to their own citizens.

The applicable standard of review under the APA is whether the rule was promulgated "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).[5] Given the substantial burden imposed by the Contraceptive Mandate and its alternative compliance mechanisms, there can be no question about the federal government's authority to comply with its obligations under RFRA. That should have ended both the States' APA claim and the Little Sisters' saga.

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[5] The panel opinion's determination that the Religious Exemption Rule violated 5 U.S.C. § 706(2)(A) is derivative of its conclusion on § 706(2)(C).

CONCLUSION

Instead of a powerful current running through all federal law and its implementation, RFRA as understood by the Third Circuit is a special-use pond: shallow, still, and rarely relevant to the implementation and everyday operation of federal law.

If RFRA is to be taken at its word, the Third Circuit's decision cannot stand. RFRA is a "beautiful legislative accomplishment in the terrain of religious liberty" and a sweeping law in both scope and purpose. Paulsen, 56 Mont. L. Rev. at 294. From start to finish, a federal law and the federal government actors charged with implementing it are subject to RFRA's commands. This Court should restore RFRA's super-statute status and reverse the decision of the Third Circuit.

Respectfully submitted,

JOHN P. O'HERRON
THOMPSONMCMULLAN, P.C.
100 Shockoe Slip
Richmond, VA 23219
(804) 698-6253
joherron@t-mlaw.com

JOHN D. ADAMS
BRIAN D. SCHMALZBACH
Counsel of Record
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4746
bschmalzbach@mcguirewoods.com